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In The

Supreme Court of the United States

October Term, 1969

No. 1201

GEORGE WILLIAM CROCKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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OPINIONS BELOW

The decision of the United States District Court for the District of Minnesota, (Neville, J.) is reported at 294 F. Supp. 776. The decision of the United States Court of Appeals for the Eighth Circuit (Heaney, J.) is as yet not reported. Both opinions are reprinted in Appendix A hereof.

JURISDICTION

Motion in arrest of judgment was denied in the District Court on January 16, 1969, and final judgment and sentence were entered March 18, 1969. Denial of motion in arrest of judgment and final judgment were affirmed in the Circuit Court on January 8, 1970. This Court has jurisdiction under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Is the Military Selective Service Act of 1967 null and void under Article I, Section 8, Clauses 12, 15, 16 and 18; Article I, Section 10, Clause 3, and Amendment II of the Constitution of the United States?

2. Is the Military Selective Service Act of 1967 unconstitutional in that it is not a "proper" means to "raise armies" and circumvents the constitutional processes for "calling forth the militia"?

3. Were *Selective Draft Law Cases*, 245 U.S. 366 (1918), decided on the basis of false historical and legal premises?

4. Does reason compel this Court to review the issues of this case in light of the following observations below by the United States Court of Appeals for the Eighth Circuit?

(1) The reasons advanced by petitioner for overturning the *Selective Draft Law Cases*, *supra*, are "serious and thoughtful."

(2) The argument in this case advanced against the constitutionality of direct federal conscription "was not advanced when the question was first decided."

(3) A circuit court may not overrule the decisions of this Court.

CONSTITUTIONAL PROVISIONS

The provisions of the *Constitution of the United States* here pertinent are Article I, Section 8, Clauses 12, 15, 16 and 18; Article I, Section 10, Clause 3, and Amendment II, which read as follows:

Article I, Section 8:

"Congress shall have power . . .

"To raise and support Armies, but no appropriation of money to that use shall be for a longer term than two years; . . . (Clause 12)

"To provide for calling forth the Militia to execute laws of the Union, suppress insurrections, and repel invasions; (Clause 15)

"To provide for organizing, arming, and disciplining the Militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the Militia according to the discipline prescribed by Congress; . . . (Clause 16)

"To make all laws which shall be necessary and proper for carrying into execution the foregoing powers . . . (Clause 18)

Article I, Section 10 of the *Constitution* provides in pertinent part:

"No State shall, without the consent of Congress, . . . keep troops and ships of war in time of peace, . . . or engage in war, unless actually invaded or in such imminent danger as will not admit of delay." (Clause 3)

Amendment II provides:

"A well regulated Militia being necessary to the security of a free State, the right of the People to keep and bear arms shall not be infringed."

STATUTORY PROVISIONS

The statute here in question is the Military Selective Service Act of 1967, 50 App. *U.S.C.*, Section 451, *et seq.*, in its entirety. While the entire statute is here brought into question, only the provisions most directly pertinent are set out in Appendix B hereof, namely, parts of 50 App. *U.S.C.*, Sections 451 and 454.

STATEMENT OF THE CASE

Petitioner, a Quaker, was convicted for refusal to report for and submit to induction contrary to the Military Selective Service Act of 1967. Petitioner refused to apply for conscientious objector status: he believes that any kind of cooperation with the Selective Service System is morally and legally wrong.

At trial on November 27, 1968, in the District Court, it was shown that petitioner was in due course classified 1-A, ordered to report for induction and refused induction. It was further established by evidence specifically admitted to raise the question of the constitutionality of the Draft Act, that the Draft Act is administered by professional soldiers commissioned to the President; that petitioner was ordered against his wishes into the "Army of the United States" under the Draft Act; that while one is part of the "Army," he is subject to orders and training by professional soldiers commissioned by the President and may be used in any part of the world for any military purpose.

Upon conviction by jury, petitioner filed a timely motion in arrest of judgment urging that the Draft Act is unconstitutional in that it is not a "proper" means to "raise armies" and circumvents the constitutional processes for "calling forth the militia." The motion was denied on January 16, 1969. Petitioner was sentenced to four years in prison on March 18, 1969. From the denial of the motion in arrest of judgment and from final judgment and sentence petitioner appealed. The Circuit Court affirmed on January 8, 1970.

REASONS FOR GRANTING THE WRIT

A. Introduction.

Certiorari should be granted because the Military Selective Service Act of 1967 rests on *Selective Draft Law Cases*, 245 U.S. 366 (1918), which held that Congress has the constitutional power to "raise armies" by conscription and that case was wrongly decided: a new evaluation thereof is necessary in light of crucial historical information overlooked, misunderstood, or ignored by the Court more than fifty years ago.

Since *Selective Draft Law Cases, supra*, were decided under a formal declaration of war, it has been argued that the question of constitutionality of peace-time conscription is an open question. *Holmes v. United States*, 391 U.S. 936 (1968). Cf. *Congressional Record*, August 23, 1940, *Appendix* (Hon. Burton K. Wheeler of Montana). This position has consistently been rejected by this and other federal courts. See e.g., *Holmes v. United States, supra*; *Ashton v. United States*, 404 F.2d 95 (8th Cir. 1968). And we think rightly so. *We do not contend that the draft is "unconstitutional in time of peace."* See Heaney, J., *United States v. Crocker*, ... F.2d ..... (8 Cir. 1970). That contention presupposes the power of Congress to "raise armies" by conscription. The Constitution makes no distinction between war and peace insofar as the power to "raise armies" is concerned. And we are certain that the Framers intended Congress to have the power to "raise armies" in time of peace. See e.g., Hamilton, *The Federalist*, No. 24; 1 Stat. L. 119 (1790).

We make a considerably different argument, summarized by Judge Heaney of the 8th Circuit in this case below, as follows:

"Primarily, the appellant (petitioner) argues that the Act is unconstitutional under Article I, Section 8, Clauses 12, 15, 16, and 18; Article I, Section 10, Clause 3; and Amendment II of the United States Constitution.

"He argues that, according to the Framers of the Constitution, the precise meaning of the word 'armies' refers to professional troops, and that the meaning of 'militia' refers to citizen troops, including everyone *compelled* to render military service. He argues that, on the basis of these precise meanings: (1) Congress has no power to conscript 'armies'; (2) Congress may compel military service only by 'calling forth the militia'; and (3) the Military Selective Service Act of 1967 is not a 'proper' means of 'raising armies,' and it circumvents the constitutional processes for 'calling forth the militia.'". *United States v. Crocker, supra,* ..... F.2d at .....

B. General Points of Jurisprudence and History.

Referring to the foregoing argument, which we ask this Court to consider, the 8th Circuit (per Heaney, J., for himself, Matthes, J., and Van Oosterhout, C. J.) noted:

"The appellant (petitioner here) argues that the precise meaning of the 'armies' and 'militia,' as used by the Framers of the Constitution, was misconstrued by the Court in *Selective Draft Law Cases, supra,* perhaps because the argument advanced here, based on constitutional history, was not advanced when the question was first decided.

"The reasons advanced by the appellant (petitioner here) for overturning the decisions of the Supreme Court are serious and thoughtful. But, we cannot overturn the decisions of the Supreme Court here." *United States v. Crocker, supra,* ..... F.2d at .....

We are fully sympathetic with the foregoing observations. This Court must resolve the grave doubts as to the constitutionality of the Military Selective Service Act of 1967 now

publicly acknowledged by the United States Court of Appeals for the Eighth Circuit.

Selective Draft Law Cases, supra, upon which all subsequent precedents to the same effect rely, were based on this historical assumption:

> "The compulsory draft was a normal method of raising armies in 1787 when the Constitution was adopted." *Selective Draft Law Cases, supra,* 245 U.S. at 369 (Government's Brief), and at 377-378 (Court's Opinion).

The truth of the matter was recently stated by Edward S. Corwin as follows:

> "The only type of standing army known to the Framers was a mercenary, volunteer force, and the only compulsory type of service known to them was service in the militia which was confined to local and limited purposes as it had been in medieval England, and still is in Clause 15 (of Article I, Section 8 of *The Constitution of the United States*)." Corwin, *The Constitution and What It Means Today,* Antheneum, New York, 1965, p. 71. Cf. *Dictionary of American History,* Chas. Scribner's Sons, New York, Vol. I, p. 112 ff. (under "Army of the United States"), and Vol. III, p. 402 (under "Militia"); *Oxford Universal Dictionary,* p. 99 (under "Army") and p. 1250 (under "Militia").

This historical fact was not called to the attention of or was overlooked by the Court in 1918 when *Selective Draft Law Cases, supra,* were decided. After several years of research and on the basis of very great quantities of historical evidence, we have come to the inescapable conclusions: (1) That the word "armies" was used by the Framers as a legal term of art specifically meaning *professional* troops; (2) that the power to "raise armies" was intended by the Framers to be the power of *hiring* or *enlisting* professional soldiers; (3) that the word "militia" was used by the Framers as a legal term of art specifically meaning *citizen* soldiers, including all *compelled* to render military service;

and (4) that the Framers intended the power of "calling for the militia" to be the power of compelling citizens to render military service to "execute laws of the Union, suppress insurrections and repel invasions." We are pleased to acknowledge that Leon Friedman, Esq., of New York has reached very similar conclusions through research apparently concurrent with but independent of ours. See Mr. Friedman's excellent article *Conscription and the Constitution: The Original Understanding*, 67 Mich. L. Rev. 1493 (1969). It should be noted that during the Civil War the same conclusions were reached by Chief Justice Roger B. Taney of this Court. *Thoughts on the Conscription Law of the U. States—Rough Draft Requiring Revision*, reprinted in *18 Tyler's Quarterly Historical & Genealogical Magazine*, 72 (1936), and cited by Douglas, J. in *Holmes v. United States, supra*, 391 U.S. 945-946 (Footnote 8). *Cf. Kneedler v. Lane*, 45 Pa. St. 238 (1963-1964).

It should be emphasized that *we are not asking this Court to consider here a claim that all compulsory military service is illegal;* We simply maintain that the "militia" provisions of the *Constitution* set out certain rational limits on use and organization of citizen soldiers that would prohibit, for example, a drafted foreign legion, but may allow compulsory duty in case of serious domestic violence or armed attack on our shores.

C. Historical Errors and Misconceptions in Selective Draft Law Cases.

Of course, we cannot here argue the full merits of our position that the current draft act is not a "proper" means to "raise armies" and circumvents the constitutional processes for "calling forth the militia." Yet, moved by that sense of good faith essential to a successful adversary system, we recognize that this Court is entitled to a *prima*

facie showing that it really can be demonstrated what the Framers meant by the words "armies" and "militia." Our briefs to the district and circuit courts are sufficient for that purpose, and we include hereunder in this petition a few illustrative examples from the mountain of available evidence which historically describes the constitutional distinction between "armies" and "militia": thereby, we earnestly hope, this Court will be able to witness for itself important portions of the testimony of the Framers relative to this all-important subject of compulsory military service, which at present is rocking the very foundation of this Republic—and egregious errors in *Selective Draft Law Cases, supra,* upon which the current draft system is based.

The Court tried to make much of the fact that the power of compulsory military service existed in England prior to the American Revolution. *Selective Draft Law Cases, supra,* 245 U.S. at 378-379. The Court failed to acknowledge, however, that Englishmen thought of compulsory service as service in the "militia": indeed, during Queen Anne's reign—in 1704 and again in 1707—the British Parliament twice rejected as unconstitutional proposals to conscript "armies". See *e.g., Kneedler v. Lane, supra,* 45 Pa. St. at 254-255 (Woodward, J.).

It has been argued that George Washington favored conscript "armies." *Kneedler v. Lane, supra,* 45 Pa. St. at 287 (Read, J.). In truth, however, Washington favored conscription to raise "Militia" made up of citizens to guard against "mercenary Armies." Washington, *Sentiments on a Peace Establishment* (1783), reprinted in Commins, *Basic Writings of George Washington,* Random House, New York (hereafter cited *Commins*), p. 468 ff. at pp. 479-480. Referring to conscription, Washington wrote:

> "It may be laid down to a primary position, and the basis of our system, that every *Citizen* who enjoys the pro-

> tection of a free government, owes not only a proportion of his property, but even of personal services to the defence of it, and consequently that the *Citizens* of America (with a few legal and official exceptions) from 18 to 50 years of age should be borne on the *Militia* rolls . . . ." (Emphasis added.) *Commins*, p. 480.

These words were not discovered by historians until more than a decade after *Selective Draft Law Cases, supra,* were decided. As to further views of Washington and his Secretary of War, Henry Knox, see *Annals of Congress*, Vol. 1, col. 1076, *et seq.*, and Vol. 2, col. 2087, *et seq.*

In *Selective Draft Law Cases, supra,* it was argued with the full endorsement of the Court that the history of the Philadelphia Convention of 1787 shows the Framers definitely did not intend to limit "armies" to "voluntary enlistments." *Selective Draft Law Cases, supra,* 245 U.S. at 369. Again, quite the contrary is the case: James Madison's *Notes on Debates in the Federal Convention of 1787* (cited hereafter, *Notes*), reproduced in *Documents Illustrative of the Formation of the Union of American States*, United States Government Printing Office, Washington, D.C., 1927 (cited hereafter, *Documents*), pp. 109-745, contain instance after instance showing that "armies" were thought of as professional troops and that "militia" were thought of as citizen troops. As just one example, we point to George Mason of Virginia proposing that the clause giving Congress the power "to provide for organizing, arming and disciplining the Militia, etc." (Article I, Section 8, Clause 16), be given a prefatory amendment reading: "And that the liberties of the people may better be secured against the danger of Standing Armies in time of peace." The thrust and purpose of the proposal was to emphasize the notion that the citizen "militia" was to protect the general citizenry from professional "armies." The principle of the

proposal was acceptable, but it was voted down because, as Gouverneur Morris of Pennsylvania put it, ". . . it would put a dishonorable mark of distinction on the military class of citizens." *Notes,* September 14, 1787; *Documents,* p. 725. Here we find the "army" referred to as the "military class" of the country—in other words as the professional military.

It has been argued that since Hamilton said the power to "raise armies" should exist "without limitation," *The Federalist,* No. 23, 4th paragraph, and, since the Framers well knew of conscription, the power to "raise armies" was intended by the Framers to include the power to conscript. See *e.g., Selective Draft Law Cases, supra,* 245 U.S. at 370 (Government's Brief) and at 377-378 (White, C.J.); *Kneedler v. Lane, supra,* 45 P. St. at 283-284 (Read, J.).

But in truth Hamilton thought of "armies" as professional troops: He believed the power to hire *professional soldiers* should exist without limitation, largely because of his deep dislike of conscription or service in the "militia." Hamilton, *The Federalist,* Nos. 24, 29. Thomas Jefferson favored a constitutional prohibition of "armies" in time of peace, because professional troops are dangerous to civilian government. Jefferson's letters to Madison for December 20, 1787, and July 31, 1788, reproduced in *Life and Selected Writings of Thomas Jefferson,* Random House, New York (hereafter cited *Jefferson*), p. 436 ff. and p. 450 ff. Hamilton's argument against such a constitutional prohibition was that if peace-time military duty could not be done by "armies" it would have to be done by "militia," and that would entail conscription, the most hated evil of all. To quote Hamilton himself:

> "Previous to the revolution and ever since the peace there has been a constant necessity for keeping small garrisons on our western frontier. . . . These garrisons must *either be furnished by occasional detachments from the Militia or by permanent corps in the pay of*

the Government. The first is impracticable, and if practicable, would be pernicious. The *Militia* would not long, if at all, *submit* to being *dragged* from their occupations to perform that most disagreeable duty in times of profound peace. And, if they could be *prevailed upon or compelled to do it,* the increased expense of a frequent rotation of service, and the loss of labor and disconcertation of industrious pursuits of individuals would form conclusive objections to the scheme. It would be as burdensome and injurious to the public as well as to private *Citizens.* The latter resource of *permanent corps in the pay of the Government amounts to a Standing Army* in time of peace." (Emphasis added.) Hamilton, *The Federalist,* No. 24, 11th paragraph.

As to further views of Jefferson and Hamilton on Compulsory military service—"Militia" service, see, for example: Jefferson's letter to Kusciusko, February 10, 1810, reproduced in *Jefferson,* p. 600 ff.; Hamilton, *The Federalist,* No. 29.

In *Selective Draft Law Cases, supra,* no reference was made to the Second Amendment. Had the Court looked into this provision, it would have discovered crucial material showing that the Framers defined the "militia" as "the body of the people capable of bearing arms"; that the Framers thought of compulsory military service as service in the "militia" exclusively; and that the Framers intended the Amendment primarily as a safeguard to protect the "militia" made up of citizens, from "armies" made up of professional soldiers. See, *e.g., Annals of Congress,* Vol. 1, cols. 434, 749, *et seq.,* 467, *et seq.; Patterson,* pp. 86-89, 111, 181-182, 196-197; *Documents,* pp. 1030, 1047, 1055. An interesting example of such material is one of James Madison's proposals for amendment made in the House of Representatives on June 8, 1789, which read as follows:

"The right of the *People* to keep and bear arms shall not be infringed; a well-regulated *Militia* being the best

security to a free country; but, no person religiously scrupulous of bearing arms shall be *compelled* to bear arms." *Annals of Congress,* Vol. 1, Col. 434; *Patterson,* p. 111.

It has been argued that the "rejection" of the "proposals" of the Rhode Island Constitutional Convention of 1790 to limit compulsory military service shows that the Framers thought Congress could "raise armies" by conscription. *Selective Draft Law Cases, supra,* 245 U.S. at 369-370 (Government's Brief); *Kneedler v. Lane, supra,* 45 Pa. St. at 287 (Read, J.). Detailed analysis, too lengthy for purposes of this petition, reveals the truth of the matter to be quite different. One of the "proposals" was in fact a "declaration" of the natural, inalienable right of religious conscientious objection to "*militia*" service. The other, which was neither "accepted" nor "rejected," concerned the *deployment* of conscripted "militia" from one state to another—not the means of *raising* "armies." *Documents,* pp. 1055, 1057. *Cf., Documents,* pp. 1030, 1032, 1034-1035, 1047, 1049; Elliot, *Debates,* J. P. Lippencott & Co., Philadelphia, 1891, Vol. II, p. 552; Hamilton, *The Federalist,* No. 29, 11th, 12th and 13th paragraphs; *Annals of Congress,* Vol. 1, cols. 434, 749, *et seq.,* and 767, *et seq.;* Patterson, *The Forgotten Ninth Amendment,* Bobbs-Merrill, Indianapolis (hereafter cited *Patterson*), pp. 87-89, 111, 181-182, 196-197.

It has been argued that the Madison Administration proposed a bill to conscript "armies" during the war of 1812. *Selective Draft Law Cases, supra,* 245 U.S. at 285 (White, C.J.). The bill in question was, in fact, a bill to "call forth the militia" to supplement the ranks of the "army" in order to "repel invasions" and was defeated largely on constitutional grounds. See *e.g., Annals of Congress,* Vol. 28, col. 70, *et seq.* (Hon. David Daggett of Connecticut); Schlissel, *Conscience in America,* E. P. Dutton Co., Inc., New York,

1968, p. 64 ff. (Hon. Daniel Webster of New Hampshire); Leach, *Conscription in the United States: Historical Background*, Chas. E. Tuttle Pub. Co., Rutland, Vt., 1952, Chs. III, IV, V, VI and VII.

D. Errors of General Argument in Selective Draft Law Cases.

Several general arguments made by the Court in *Selective Draft Law Cases, supra*, are manifestly erroneous and historically inaccurate.

The Court argued that unless Congress had the power to conscript, there would be an "Army without men to compose it."* *Selective Draft Law Cases, supra*, 245 U.S. at 377 (White, C. J.). That argument overlooks the power to "raise armies" by enlistment, which was the only way "armies" were raised when the Constitution was adopted. See, *e.g.*, 1 Stat. L. 119 (1790). The Court countered, however, that raising "armies" by "enlistments" is "in no substantial sense a power." *Selective Draft Law Cases, supra*, 245 U.S. at 378 (White, C.J.). Not only is that position abstractly nonsenical, but it ignores the fact that the power to "raise armies"—to hire professional troops directly—was thought by the Framers to be a very substantial power, the propriety of which was much debated during the years of constitutional adoption; did not exist under the *Articles of Confederation;* and was one of the central points of controversy during the English Revolution of 1688. *Articles of Confederation*, Articles II, VII and IX; Hamilton, *The Federalist*, No. 22, 5th paragraph, No. 24, and No. 26, 4th paragraph.

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*"As the mind cannot conceive an Army without men to compose it, on the face of the Constitution the objection that it does not give power to provide for such men would seem to be too frivolous for further notice." 245 U.S. at 377.

The Court said that the power of "calling forth the militia" is subordinate to, yet separate from, the power to "raise armies"; in other words, that Congress may draft the "militia" directly into the "army" and treat the soldiers thus raised as part of the "army" free from constitutional limitations on the use and organization of the "militia." *Selective Draft Law Cases, supra,* 245 U.S. at 381-383 (White, C.J.). Yet, if that holds, Congress may at will circumvent all of the intricate limitations on the use and organization of the "militia"; and the "militia" clauses, the lengthiest in the Constitution, are "the idlest words ever written." *Cf., Kneedler v. Lane, supra,* 45 Pa. St. at 256-257 (Woodward, J.). Once Congress appropriates funds, under Article I, Section 8, Clause 12, "Armies" are under the complete control of the President and may be used anywhere in the world for any military purpose. On the other hand, Article I, Section 8, Clauses 15-16, impose important limitations on the use of the "militia" and carefully divide authority over the "militia" between the state and federal governments. Moreover, the notion that Congress may draft "militia" directly into the "army" ignores the legislative history of Article I, Section 8, Clause 16, and Amendment II of the Constitution which shows that the Framers desired to protect the citizen "militia" from the danger of "standing armies." See, *e.g., Notes,* September 25, 1787, *Documents,* p. 725 (George Mason); *Annals of Congress,* cols. 749-750; *Patterson,* pp. 181-182 (Elbridge Gerry).

A central theme in *Selective Draft Law Cases, supra,* is the notion that conscription is an inherent power of Government. To buttress that theme, the Court pointed to the fact that conscription was practiced by a number of foreign governments in 1918. *Selective Draft Law Cases, supra,* 245 U.S. at 378-379 (Footnote 1). While there is arguable merit in the idea that a citizen owes his personal services to the

defense of his country, it should be remembered that the fathers of the country thought of such service as service in the "militia." *Cf.*, Washington, *Sentiments on a Peace Establishment, supra*, *Commins*, p. 480. Needless to say our *Constitution* derives its meaning from the intentions of the Framers—not the acts of foreign governments in 1918.

When all is said and done, the central error in *Selective Draft Law Cases, supra*, is the failure of the Court to comprehend the simple truth that the Framers conceived of "armies" as professional troops and "militia" as citizen troops including all compelled to render military service —a point which can be documented by a mountain of historical evidence, only a small portion of which has herein been briefly set forth merely for purposes of illustration. For further critique of *Selective Draft Law Cases, supra*, see: Black, *"The Selective Draft Law Cases—a Judicial Milepost on the Road to Absolutism,"* XI Bost. L. Rev. 37 (1937); see also: Friedman, *Conscription on the Constitution: the Original Understanding, supra*. *Cf.* Taney, *supra*. *Kneedler v. Lane, supra*, is good background, but one should be cautioned relative to several important historical errors, particularly in the opinions of Read and Strong, JJ.

E. Conclusion.

The seriousness of the problems and massive distress created by the current draft system is altogether obvious: In terms of individuals affected, the constitutionality of that system is one of the greatest legal issues of our day. The constitutionality of that system is in grave doubt by reason of considerations and facts not called to the attention of this Court when it first decided that Congress may "raise armies" by conscription over fifty years ago in *Selective Draft Law Cases, supra.* The gravity of the doubt has been forthrightly and honestly acknowledged by the United States Court of Appeals for the Eighth Circuit. Unless and until that doubt is resolved one way or another, a shroud of illegality will be cast over each and every induction ordered pursuant to the Military Selective Service Act of 1967, and it will be only a matter of time before the Courts are virtually flooded with litigation revolving around the simple, yet sweepingly crucial distinction between the constitutional power to "raise armies" and the constitutional power of "calling forth the militia." At the very least our young male citizens and their loved ones are entitled to a clear analysis by this Court of what the Framers really did intend with respect to compulsory military service—if the Framers did intend conscript "armies," *Selective Draft Law Cases, supra,* are insufficient to show it. Grave legal doubts relative to serious practical problems cannot long endure in a restless society without awesome consequences.

Again, we are not asking the Court to consider the claim that all forms of compulsory military service are illegal: on the contrary, we merely propose a question relative to prudent limitations on the use and organization of citizen soldiers.

Nor do we ask this Court to legislate: We propose nothing requiring sociological jurisprudence or judicial philoso-

phizing: We simply ask the Court to interpret and apply the *Constitution* on the basis of objective, demonstrable historical fact, and according to the principle that the *Constitution* must be interpreted to effect the intentions of the Framers rather than the political passions of the day.

Wherefore petitioner prays that a writ of certiorari issue: A judicial invitation has been extended; a serious question begs a serious answer; the citizen "militia" awaits a transpicuous determination of its ancient rights.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-68 Cr. 51

United States of America,

Plaintiff,

vs.

George William Crocker,

Defendant.

ORDER DENYING MOTION FOR ACQUITTAL, OR FOR ARREST OF JUDGMENT, OR FOR A NEW TRIAL

The above case came before the court on January 2, 1969, at St. Paul, Minnesota, on the post-verdict motion of defendant for a judgment of acquittal or dismissal, for arrest of judgment, or in the alternative for a new trial.

Peter J. Lindberg, Esq., of Minneapolis, Minnesota, appeared for defendant in support of the motion; Patrick J. Foley, United States Attorney by William E. Falvey, Esq., Assistant United States Attorney, appeared for the United States in opposition thereto. Earlier, and following the jury's verdict of guilty, the court on motion granted leave to Chester A. Bruvold and John R. Graham, Esqs., attorneys in Minneapolis, Minnesota, to file briefs amicus curiae and to appear and argue orally in support thereof.

The court has reviewed the evidence in the case, has heard the arguments of counsel, has read briefs submitted by defendant's counsel and by amicus curiae, and on the basis thereof and on all of the files, records and proceedings herein,

IT IS ORDERED that defendant's motion be, and the same hereby is, in all things denied.

IT IS FURTHER ORDERED that the case be referred to the Probation Officer of this court for a presentence investigation and report to the court.

Dated: January 16, 1969.

/s/ PHILIP NEVILLE
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

No. 3-68 Cr. 51

United States of America,

Plaintiff,

vs.

George William Crocker,

Defendant.

NEVILLE, District Judge.

Defendant, 20 years of age, was indicted for failure to perform a duty required of him under the Universal Military

Training and Service Act and the rules, regulations and directions made pursuant thereto, in that he failed and neglected to comply with an order of his Local Board to report for and submit to induction into the Armed Forces of the United States, in violation of Title 50, Appendix, United States Code, Section 462. The case was tried before a jury at St. Paul, Minnesota on November 27, 1963. The jury returned a guilty verdict. Defendant's own testimony was to the effect that he had indicated on his original classification questionnaire that he wished to be considered a conscientious objector; that on receiving from his Local Board what is known as Form #150, a form designed to provide detail as to the basis for a conscientious objector's belief, defendant discussed it with several people and concluded not to complete it and sent it back to his Board blank; that in his opinion anything relating to the Selective Service Act is wrong and symbolizes a totalitarian state. There was other evidence that later communications from the Local Draft Board to defendant went unanswered and in one or more instances such were returned unopened. Defendant was subsequently classified 1A. He took no appeal from this classification as permitted by law and the rules and regulations of the Selective Service Law. There is no question in the court's mind but that the jury was warranted in finding defendant's failure to obey the order of his Local Draft Board knowing and willful.

Defendant and the lawyers appearing amicus curiae contend that the Universal Military Training and Service Act is unconstitutional during peace time in that it creates an involuntary servitude within the meaning of the prohibition of the Thirteenth Amendment to the United States Constitution, and is in excess of the powers conferred on the Federal Government by Article I, Section 8 of the Constitution. Counsel have submitted briefs expanding on both of these

contentions. For the reasons stated below, this court is not convinced that the power of Congress to provide for the common defense is as limited as counsel urge. This court must consider the United States Constitution itself and the appellate court decisions interpreting its provisions. Arguments attempting to show the lack of wisdom of the Vietnam War or of the draft system are not rightly directed to the court, but rather are political questions belonging in the halls of Congress. See *United States v. Sisson*, 37 U.S.L.W. 2301 (D.C. Mass. Nov. 25, 1968).

Defendant claims that all cases heretofore decided have erroneously sustained the constitutionality of the draft in reliance on the *Selective Draft Cases*, 245 U.S. 366 (1918), and that that case patently was wrongly decided. Defendant does not attempt to distinguish that case except to say that it involved war time conscription, whereas the present law was not passed during a formally declared state of war. The court does not believe that the Selective Draft Cases can be distinguished on the ground urged and since it is a decision of the highest court of the land, it must be followed by this court unless and until overruled. See also *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *Lichter v. United States*, 334 U.S. 742, 756, n. 4 (1948).

Both the defendant and amicus curiae argue that at the time of the adoption of the Constitution an "army" was a professional voluntary non-conscript force and that both those favoring a strong central government and those favoring greater power for the states were in agreement that conscription was undesirable. Hence, they argue, the Constitution must be read to prohibit a national conscript army. As a further basis it is argued that state militias were conscript citizen armies and that hence only by following those clauses of Article I, Section 8 of the Constitution which deal

with militia and their federal service can a conscript army be raised.

The only case cited by defendant in support of this view is *Kneedler v. Lane*, 45 Pa. St. 238 (1863), wherein was challenged the constitutionality of the 1863 conscription Act. Not only was the Act eventually upheld by that state court, but the case is superseded as far as this court is concerned by the *Selective Draft Cases*, 245 U.S. 366 (1918). For a complete discussion of the *Kneedler* case, and the contentions advanced in the case at bar, see the excellent and exhaustive memorandum by Senior District Judge John Delehant in *United States v. Richmond*, 274 F. Supp. 43, 66-75 (C.D. Cal. 1967). Compare Bernstein, *Conscription and the Constitution: The Amazing Case of Kneedler v. Lane*, 53 A.B.A.J. 708 (1967). A multitude of other cases have likewise sustained Congressional power to conscript whether or not a state of war had been formally declared by Congress. See *e.g.*, *United States v. O'Brien*, *supra*; *United States v. Hogan*, 369 F.2d 359 (2nd Cir. 1966); *Howze v. United States*, 272 F.2d 146, 148 (9th Cir. 1959).

Defendant's second claim that a peacetime draft law violates the Thirteenth Amendment to the Constitution which prohibits involuntary servitude also has continually been rejected by the courts. Even before the Selective Draft Cases, the Supreme Court had said:

> ". . . he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense." *Jacobson v. Massachusetts*, 197 U.S. 11, 29 (1905).

Conceding the unanimous judicial rejection of this argument, defendant claims that none of the courts so ruling have correctly applied the Amendment. This court is not

the proper forum in which to overrule the Supreme Court and the various Courts of Appeal that have considered the issue.

Whatever the logic of defendant's arguments of whatever ultimate different position, if any, the United States Supreme Court might some time take, if the validity of the draft "in time of peace" is still an open question—see dissent of Justice Douglas in *Holmes v. United States*, 391 U.S. 936 (1968)—this court deems itself bound by the current decisions of the Court of Appeals of its own Eighth Circuit. The most recent case, *Ashton v. United States*, ... F.2d ..... (8th Cir. #19,213, Dec. 3, 1968) met defendant's contention squarely in these words:

> "Ashton first attacks the over-all constitutionality of the draft laws and the alleged illegal use of draftees because there exists no emergency or declaration of war. *Such attack merits little discussion.* This argument has been consistently rejected. *Selective Draft Law Cases*, 245 U.S. 366 (1918); *United States v. Hogan*, 369 F.2d 359 (2 Cir. 1966); *United States v. Bolton*, 192 F.2d 805 (2 Cir. 1951) (per curiam); *United States v. Henderson*, 180 F.2d 711 (7 Cir. 1950); *United States v. Herling*, 120 F.2d 236 (2 Cir. 1951).
>
> "The United States Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968), recently observed in the draft card burning case:
>
> "'The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping. *Lichter v. United States*, 334 U.S. 742, 755-58 (1948); *Selective Draft Law Cases*, 245 U.S. 366 (1918); see also *Ex Parte Quirin*, 317 U.S. 1, 25-26 (1942). *The power of Congress to classify and conscript manpower for military* service is beyond question." (Emphasis added.)

See also *Vaughn v. United States*, ... F.2d ..... (8th Cir. #19,125, Dec. 4, 1968), where the court summarily disposed of the argument that the Selective Service Act is unconstitutional.

A separate order has been entered denying defendant's motion for acquittal, or for arrest of judgment, or alternatively for a new trial.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 19,673 and 19,737

United States of America,

Appellee,

vs.

George William Crocker,

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

[January 8, 1970.]

Before VAN OOSTERHOUT, Chief Judge; and MATTHES and HEANEY, Circuit Judges.

HEANEY, Circuit Judge.

The appellant, George William Crocker, was convicted of failing to report for and submit to induction into the Armed Forces of the United States in violation of 50 App.

U.S.C. § 462. The decision of the United States District Court for the District of Minnesota is reported at 294 F. Supp. 776 (D. Minn. 1969). We affirm.

The appellant noted on his original classification questionnaire that he wished to be classified as a conscientious objector. Shortly thereafter, the appellant received from his Local Board a form, known as Form 150, which is designed to provide a detailed basis for the conscientious objector's belief. The appellant discussed the filling out of this form with several people, concluded not to complete the form, and sent it back blank to his Local Board. The appellant, a pacifist, is of the opinion that any cooperation with the Selective Service System is wrong. The appellant was subsequently classified 1-A. He took no appeal from his classification as permitted by the rules and regulations of the Selective Service Law.

The appellant's only defense in the District Court and his only argument on appeal is that the Military Selective Service Act of 1967, 50 App. U.S.C. §451, *et seq.*, is unconstitutional. Primarily, the appellant argues that the Act is unconstitutional under Article I, Section 8, Clauses 12, 15, 16 and 18; Article I, Section 10, Clause 3; and, Amendment II of the United States Constitution. He argues that, according to the Framers of the Constitution, the precise meaning of the word "armies" refers to professional troops, and that the meaning of "militia" refers to citizen troops, including everyone *compelled* to render military service. He argues that, on the basis of these precise meanings: (1) Congress has no power to conscript "armies"; (2) Congress may compel military service only by "calling forth the militia"; and (3) the Military Selective Service Act of 1967 is not a "proper" means of "raising armies," and it circumvents the constitutional process for "calling forth the militia."

The constitutionality of conscripting "armies" was first fully examined and upheld by the Supreme Court in *Selective Draft Law Cases,* 245 U.S. 366 (1918). The question has been raised many times since then, but in every instance, the Court has upheld the constitutionality of conscription.[1] This Court has followed the decisions of the Supreme Court. See, *e.g., Ashton v. United States,* 404 F.2d 95 (8th Cir. 1968), *cert. denied,* 394 U.S. 960 (1969); *Humes v. Pescor,* 148 F.2d 127 (8th Cir. 1945).

Recently, the most frequently used argument, contesting the constitutionality of conscription, has been that *Selective Draft Law Cases, supra,* was decided while the United States was under a formal declaration of war; that the question decided, therefore, applied only to conscription during time of war; and that the constitutionality of conscription, in the absence of a declaration of war, is still an open question. The courts, however, have consistently rejected this argument, relying primarily on *Selective Draft Law Cases, supra.*[2] The appellant notes that such an argument presupposes the constitutional power to "raise armies" by conscription. He further notes that Article I, Section 8, Clause 12, does not distinguish between war and peace.

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[1]Shortly after the Court rendered its decision in *Selective Draft Law Cases,* 245 U.S. 366 (1918), it granted an appeal which raised similar constitutional arguments. Relying on its decision in *Selective Draft Law Cases, supra,* the Court again upheld the constitutionality of conscripting "armies." *Cox v. Wood,* 247 U.S. 3 (1918).

For other cases, see, e.g., *United States v. Nugent,* 346 U.S. 1 (1953); *Lichter v. United States,* 334 U.S. 742 (1948); *Hamilton v. University of California,* 293 U.S. 245 (1934); *Tatum v. United States,* 146 F.2d 406 (9th Cir. 1944); *United States v. Herling,* 120 F.2d 236 (7th Cir. 1941). See also, Note 2.

[2]*United States v. O'Brien,* 391 U.S. 367 (1968); *United States v. Hogans,* 369 F.2d 359 (2d Cir. 1966); *Etcheverry v. United States,* 320 F.2d 873 (9th Cir.), *cert. denied,* 375 U.S. 930 (1963); *United States v. Henderson,* 180 F.2d 711 (7th Cir.), *cert. denied,* 339 U.S. 963 (1950); *United States v. Richmond,* 274 F.Supp. 43 (C.D. Cal. 1967).

Moreover, he clearly illustrates that such is not his argument here.

The appellant argues here that the precise meaning of the words "armies" and "militia," as used by the Framers of the Constitution, was misconstrued by the Court in *Selective Draft Law Cases, supra*,[3] perhaps because the argument advanced here, based upon constitutional history, was not advanced when the question was first decided.

The reasons advanced by the appellant for overturning the decisions of the Supreme Court are serious and thoughtful. But, we cannot overturn the decisions of the Supreme Court here. *Ashe v. Swenson*, 399 F.2d 40 (8th Cir. 1968), *cert. granted*, 393 U.S. 1115 (1969); *Ferina v. United States*, 340 F.2d 837 (8th Cir.), *cert. denied*, 381 U.S. 902 (1965).

The appellant's second argument is that compulsory military service is unconstitutional as violative of his Thirteenth Amendment right against involuntary servitude. This claim has been squarely faced and rejected by the Courts. See, *e.g., Selective Draft Law Cases, supra; Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

The judgment of the District Court is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[3]It appears that one Supreme Court Justice would vote to grant certiorari in order to re-examine the basis of *Selective Draft Law Cases*. See, *Holmes v. United States*, 391 U.S. 936 (1968) (denial of cert.) (dissenting opinion of Justice Douglas).

APPENDIX B

§ 451. SHORT TITLE; CONGRESSIONAL DECLARATION OF POLICY

(a) This Act may be cited as the "Military Selective Service Act of 1967."

(b) The Congress declares that an adequate armed strength must be achieved and maintained to insure the security of this Nation.

* * * * *

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§ 454. PERSONS LIABLE FOR TRAINING AND SERVICE

(a) *Age limits; training in National Security Training Corps; physical and mental fitness; adequate training facilities; assignment to stations and units; training period; medical specialist categories.*

Except as otherwise provided in this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], every male citizen of the United States and every male alien admitted for permanent residence, who is between the ages of 18 years and 6 months and 26 years, at the time fixed for his registration, or who attains the age of 18 years and 6 months after having been required to register pursuant to section 3 of this title [section 453 of this Appendix], or who is otherwise liable as provided in section 6(h) of this title [section 456(h) of this Appendix], shall be liable for training and service in the Armed Forces of the United States: * * *

* * * * *

* * * The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title [said sections] (including but not limited to selection and induction by age

group or age groups) such number of persons as may be required to provide and maintain the strength of the Armed Forces.

* * * * *

The persons inducted into the Armed Forces for training and service under this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix] shall be assigned to stations or units of such forces. Persons inducted into the land forces of the United States pursuant to this title [said sections] shall be deemed to be members of the Army of the United States; * * *.

* * * * *

Every person inducted into the Armed Forces pursuant to the authority of this subsection after the date of enactment of the 1951 Amendments to the Universal Military Training and Service Act [June 19, 1951] shall, following his induction, be given full and adequate military training for service in the armed force into which he is inducted for a period of not less than four months, * * *

* * * * *

(b) *Length of service; release of individuals accepted into Army National Guard, Air National Guard, and other reserve components.*

Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty-four consecutive months, unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense (or the Secretary of the Treasury with respect to the United States Coast Guard) or as otherwise prescribed by subsection (d) of section 4 of this title [subsection (d) of this section]. * * *

* * * * *